Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1940

U. S. CABLEVISION CORP.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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June 10, 1980

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NATIONAL LABOR RELATIONS BOARD,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner U.S. Cablevision Corp. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on January 23, 1980.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The decision below of the National Labor Relations Board in this matter is reported at 240 NLRB 123 (1979).

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on January 23, 1980. A

timely petition for rehearing *en banc* was denied on April 8, 1980 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Should the National Labor Relations Act countenance the forced designation of an employee as an election observer against that individual's wishes and without his consent?

2. In a case involving an election decided by a single vote, did the Court of Appeals err in concluding that as a matter of law there were no issues surrounding the designation of an unwilling employee as an election observer which required either the setting aside of the election or an evidentiary hearing into the impact of such conduct on the representation election?

STATUTE AND RULES INVOLVED

This case involves Section 7 of the National Labor Relations Act (the "Act"), 29 U.S.C. § 157 and Sections 102.69(a) and (f) of the rules and regulations of the National Labor Relations Board, 29 C.F.R. §§ 102.69(a) and (f), the texts of which are set forth in pertinent part in Appendix B.

STATEMENT OF THE CASE

Local 320, International Brotherhood of Electrical Workers ("Union") filed a representation petition with the National Labor Relations Board ("Board") seeking certification as the collective bargaining representative of a unit composed of all full-time and regular part-time construction and maintenance employees at the Beacon, New York and Monroe, New York facilities of U.S. Cablevision Corp. ("Company"). Pursuant to a Stipulation for Certification Upon Consent Election, an election was conducted on February 9, 1978. The election results showed 11 votes cast

for the Union and 10 against the Union, with one void ballot (A. 69).[1]

Shortly before the election, Tracy Dunay, Joseph Malouf and Gary Rose, three employees of the Company who were eligible voters in the underlying representation election, received certain documents in the mail from the Union. One of the documents was a copy of a letter from a Board Agent of Region Two, addressed to both the Union and the Company, asking each to designate its observers on a Region Two form and return the form to the Board. A second document was a copy of a letter from the Union to the Board which named Dunay, Rose and Malouf as election observers for the Union. The other was a copy of the Board's official instructions to election observers, which informed each employee that by virtue of his observer status, he was now an "official representative" of the Union (A. 11, 64-66). As a result of these communications, each of the three employees was made aware not only of his own designation as an observer, but also of the status of the other two employees as well.

Gary Rose first learned of his selection by the Union upon receipt of the letter. Prior to that, he had at no time discussed the possibility of his being an observer with anyone representing the Union. The documents he had received led Rose to believe that the Company had also been sent a copy of the observer designation form made out by the Union. As a result, Rose felt coerced by being forced either to have to tell his employer that he had not given the Union permission to use his name and that he was not supportive of the Union effort, or to say nothing and allow the Company to conclude from his silence that he was in favor of the Union becoming the bargaining agent for the group. Inasmuch as it upset him to realize that his Union observer status made it appear that he was in favor of the Union, a position contrary to both the statements he had made all along in discussing

[1] "A." refers to page 69 of the printed Appendix in the Court of Appeals.

the matter with certain employees he knew well and to the uncommitted approach he had taken when questioned by others, Rose informed his supervisors that he had never agreed to be an observer for the Union.

Dunay, who had been named the Union's Chief Observer, communicated to at least five additional unit employees that Rose would be the alternate Chief Observer for the Union at the election. Thus, the effect of Rose's appointment and the statement to employees which followed was to reverse his anti-Union or neutral image in the eyes of at least seven of his fellow employees, and possibly more, in the small unit of twenty-two eligible voters at a time just prior to the election. Many of Rose's friends, including those who regarded him as previously uncommitted, must have believed that he had openly announced his support for the Union. Rose believed all along that he would be required to serve as an observer for the Union and he appeared at the polls on the day of the election, as instructed, a half hour before the time they were scheduled to open. Thus, notwithstanding a last minute agreement which limited each party to a single observer, Rose's conduct on election day did not alter what his fellow employees perceived as his support for the Union.

The Company filed timely objections to conduct affecting the results of the election, alleging that the Union had interfered with the employees' freedom of choice by designating as an election observer, on a form provided by the Board, an employee who had not authorized the Union to name him as an observer for that side. In support of its position, the Company provided the Regional Director with the aforementioned detailed allegations of interference with the laboratory conditions of the election, including the names of five unit employees with whom Dunay had discussed Rose's observer status. This evidence presented substantial and material factual issues which would have benefitted from further development and cross-examination at a hearing.

Relying upon the wording of Section 102.69(a) of the Board's Rules and Regulations, 29 C.F.R. § 102.69(a), which states in part that any party may be represented by observers of its own selection, the Board's Regional Director determined that a party may force an employee to act as an election observer without his or her consent. This holding of the Regional Director is erroneous as a matter of law.

The Regional Director committed other errors of law, including her conclusion that, even assuming that Rose's involuntary designation did in fact interfere with the ballots of one or more employees, that did not warrant the close election being set aside because Dunay was not an agent of the Union in communicating Rose's status to others. After refusing to hold a hearing, the Regional Director issued her report in which she recommended that the Company's Objections be overruled in their entirety (A. 69-70, 9, 16).

The Company filed timely Exceptions to the Regional Director's report, along with a supporting brief, in which the Company reiterated its Objections, specified numerous factual and legal errors in the Regional Director's report and renewed its demand for a hearing (A. 70, 18-22). The Board adopted the Regional Director's findings and recommendations in their entirety and certified the Union (A. 23). The Union thereupon requested that bargaining commence. The Company refused that request in order to test the validity of the certification. The Union filed unfair labor practice charges with the Board, alleging that the Company had violated Sections 8(a)(5) and 8(a)(1) of the Act, 29 U.S.C. §§ 158(a)(5) and 158(a)(1) by its refusal to bargain with the Union. The Company denied that its refusal was a violation of the Act and further denied that the Union was the bargaining representative of its employees (A. 70, 67-68).

The Board granted the motion for summary judgment which had been filed by the General Counsel and held that the Company's refusal to bargain violated the Act. It found that all issues raised by the Company were, or could have been, litigated in the prior representation proceeding, and

that the Company had therefore raised no issue which was properly litigable in the unfair labor practice proceeding (A. 70-71). The Company filed a motion for reconsideration (A. 79-80) which was denied by the Board (A. 83-84).

The Board petitioned the United States Court of Appeals for the Second Circuit for enforcement of its Decision and Order pursuant to Section 10(e) of the Act, 29 U.S.C. § 160(e). The Court of Appeals held that, although it did not condone the practice of designating an employee as an election observer without his or her consent, such conduct did not raise any issues which would require either a hearing or the setting aside of the election. As a result, the Court granted enforcement of the Board's Decision and Order.

The Company petitioned the Court of Appeals for rehearing *en banc*, but the petition was denied. The Court did, however, stay its mandate pending the filing of this petition for certiorari with this Court.

In conclusion, the Company respectfully requests that this Court recognize the manifest injustices created by the Board's Decision and Order in this case and deny its enforcement.

REASONS FOR GRANTING THE WRIT

A. The Board's Interpretation of Its Own Regulations Regarding the Appointment of Observers Raises Significant and Potentially Recurring Problems under the National Labor Relations Act.

The Board grounded its holding in this case upon its assertion that, "The designation by a party of specific individuals to serve as election observers need not be conditioned upon the consent . . . of the affected individuals" (A. 13). Rose was designated as a Union observer without his knowledge or consent. There was nothing on the Region Two form (A. 64, 66) which indicated to him that he had any right to decline the position. This decision thus grants virtual carte blanche to both employers and unions to arbitrarily designate bargaining unit employees as observers

without their consent. The inescapable result would be that employees who had not declared themselves—or even worse, those who had—and those whose views may be important to other employees, are suddenly portrayed at the time of the election to be supporting that side which has designated them as observers without their consent.

It is well established that employee votes are often influenced by the feelings and declarations of their fellow workers.[2] To permit one party to designate an employee as an observer without that employee's consent opens the floodgates for improper manipulation of other employees and abuse of the Board's election mechanism.

While the Court of Appeals stated in its opinion that it did "not condone" the practice of designating an employee as an election observer without his or her consent, the Court did in fact enforce a Decision and Order of the Board which was grounded firmly on the "right" of unions and employers to engage in precisely that kind of coercion and interference. It is particularly important for this Court to grant certiorari and resolve this question of first impression before such a reprehensible practice becomes widespread. Such conduct is in clear conflict with the core of the Section 7 of the Act, 29 U.S.C. § 157, which grants employees the right to engage, or to refrain from engaging, in union activities. Untold

[2]The Board has repeatedly recognized this voter perception with regard to observers, holding that "the identity of election observers, as well as the fact that they represent the special interest of the parties is generally well known to the employees". *See, e.g., Larkwood Farms, Division of the Pillsbury Co.*, 178 NLRB 225 (1969); *Firestone Tire and Rubber Co.*, 120 NLRB 1644 (1958). Misrepresentations to some employees regarding the degree of support for a Union by their fellow employees have been held so substantial as to invalidate the use of Union authorization cards as a reliable indicator of uncoerced employee sentiment and Union majority support. See *NLRB v. Rooney Plaza Apartments*, 597 F.2d 1046 (5th Cir. 1979), and cases cited therein; *Schwarzenback-Huber Co. v. NLRB* 408 F.2d 236, 241 (2d Cir. 1969), *cert. denied*, 396 U.S. 960 (1969). The analysis applied to the validity of authorization cards applies with even greater vigor to representation elections where ballots are valid only if cast under "laboratory conditions".

numbers of other "sophisticated" unions and employers may, in light of this decision, designate popular and respected unit employees as election observers without their consent in the hope of holding out such individuals to other unit employees as supportive of their side in the representation campaigns. It is only by the granting of the petition for certiorari that this germ of a concept can be halted at this juncture, before its use in other cases becomes epidemic.

B. The Failure to Afford the Company a Hearing at Any Stage of the Proceeding Violates Due Process of Law and Conflicts with Other Courts of Appeals Decisions.

In its opinion in this case, the Court of Appeals utilized an erroneous legal standard in determining the Company's right to a hearing. While the Court recognized that the test for ascertaining whether a party is entitled to a hearing on its objections to a representation election is whether that party produced ***prima facie*** evidence of the existence of substantial and material factual issues, the Court converted that standard into a test which required the Company to establish as a matter of law the invalidity of the election itself. The Court held herein that,

> "While we do not condone the practice of designating an employee as an election observer without his or her consent, this is not the type of practice that ***automatically*** impairs the validity of an election. . . . In short, we cannot say that there are ***any issues*** surrounding the designation of the unwilling employee as an observer ***that would require the setting aside of the representation election*** . . . if resolved in Cablevision's favor."

Slip opinion at 3 (emphasis added).

To place this high evidentiary hurdle before the Company prior to its being able to obtain a hearing is at odds with the long-standing line of decisions from several courts of appeals which have adopted the ***prima facie*** evidence test and have recognized that the need for a hearing is "particularly acute" in situations, such as the case at bar, where an election is close. (The vote was 11 to 10 with one void ballot.)

In such circumstances, it simply cannot be said as a matter of law that even minor misconduct did not interfere with the election. *NLRB* v. *Skelly Oil Co.*, 473 F.2d 1079 (8th Cir. 1973); *NLRB* v. *Gooch Packing Co.*, 457 F.2d 361 (5th Cir. 1971). *See also NLRB* v. *Hale Mfg. Co.*, 602 F.2d 244, 248 (2d Cir. 1979); *NLRB* v. *Bristol Spring Mfg. Co.*, 579 F.2d 704, 707 (2d Cir. 1978); *Henderson Trumbull Supply Corp.* v. *NLRB*, 501 F.2d 1244 (2d Cir. 1974). It has recently been held that a hearing by the Board is unnecessary only where "the board accepts the factual allegations of the Company, and *no additional facts remain to be developed. . . .*" *NLRB* v. *Hale Mfg. Co., supra*, 602 F.2d at 248 (emphasis in original). Hearings have previously been ordered by the courts of appeals whenever such hearings "would have afforded the Company the opportunity to develop the facts and to obtain witnesses who could establish the effect of the incident on the attitudes of the unit employees. . . ." *Id.* at 249. It is clear that the Company's initial presentation of facts to the Board in this case demanded the development of additional facts.

The first set of facts which were in conflict and needed development pertained to the status of the Union's Chief Observer as an agent of the Union. The Regional Director concluded that the Union was not responsible for the publication of Rose's selection as a Union observer because "no evidence was adduced in the investigation to indicate that he (Dunay) was authorized to act as an agent for the Petitioner for this purpose" (A. 14 n.9). The Regional Director utilized much too narrow a view of the agency doctrine and failed to examine other theories for agency status besides express authorization. Dunay was the individual who was designated at the Union's Chief Observer, and further investigation might have shown him to have been active in and an integral part of the Union's campaign efforts. As noted earlier, the Board has held the designation of an employee as an observer to be strong evidence of that employee's support for the Union. Other employees, therefore, may have identified Dunay as the in-plant voice of the Union, and may have believed that further campaign efforts by Dunay on behalf of

the Union, such as informing them of the names of all three Union observers, had been authorized by the Union. Moreover, inasmuch as Dunay's conduct was the natural and probable consequence of the Union's action in designating Rose as an observer and in telling Dunay of this fact, the Union should have been estopped from denying responsibility for Dunay's actions.

It is submitted that, in these circumstances, further investigation and a hearing were required before the determination concerning Dunay's agency status could have been properly made by the Regional Director. The Second Circuit's affirmance of the Board on this matter is in conflict with a similar case from the Eighth Circuit Court of Appeals. In *NLRB v. Skelly Oil Co., supra*, the Court held in the context of employer objections to an election based on alleged misrepresentations that the Union election observer's status as Agent constituted an important but disputed factual issue which required further investigation and hearing.

The Second Circuit decision below also conflicts with the holding in *NLRB v. Smith Industries, Inc.*, 403 F.2d 889 (5th Cir. 1968). In that case, the Court held that the standard for determining the right to a hearing on objections to a representation election was the same test which is employed by courts in deciding whether a grant of summary judgment is proper.

> " '[S]ummary judgment can be granted only when there is "no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." ' . . .
>
> 'It is often the case that although the basic facts are not in dispute, the parties nevertheless disagree as to the inferences which may properly be drawn. Under such circumstances the case is not one to be decided on a motion for summary judgment.' " *Id.* at 893.

Evaluating the evidence in that case, the Fifth Circuit concluded that the employer was entitled to a hearing regarding

its claim of an agency relationship between the union and its chief in-plant organizer.

There were also substantial and material factual issues involved in the impact upon the unit employees of the involuntary appointment of Rose as a Union election observer. Determination of those issues also called for a hearing. The Company submitted to the Regional Director detailed information regarding the names of employees who were made aware of Rose's designation, and the names of employees to whom Rose attempted to refute his newly acquired pro-Union image. There was no evidence which indicated that Rose, or others, had discussed his true feelings about the Union with those voters who were told of Rose's observer status by Dunay, an alleged Union agent. Thus, investigation into each employee's subjective feelings as well as into objective evidence was required in order to ascertain the veracity of the claims of election interference.

The Eighth Circuit Court of Appeals has held that the failure to hold a hearing, with the opportunity to observe and examine the witnesses directly, to probe into all of the surrounding circumstances, and to view the facts cumulatively may lead to "erroneous legal conclusions." *NLRB v. Skelly Oil Co., supra,* 473 F.2d at 1084, n.14. Moreover, without such a hearing, the Company was powerless to inquire further into these or other employees' subjective states of mind since such a gathering of evidence would have violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1). *Johnnie's Poultry Company,* 146 NLRB 770, 774 (1964). In short, there were disputed substantial and material factual issues which required that the Company be granted a hearing at some stage of the proceeding.[3]

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[3] The Board's reliance upon this Court's decision in *Pittsburgh Plate Glass v. NLRB,* 313 U.S. 146, 162 (1941), in support of its grant of summary judgment (A. 71 at n.3) is also misplaced. In *Pittsburgh Plate Glass* the Board did conduct a full hearing, including presentation of witnesses and cross-examination during the representation case. The sole issue decided by this Court was whether a second hearing was required in the subsequent unfair labor practice case.

The failure of the Board and of the Court of Appeals to order such a hearing deprived the Company of due process of law. Moreover, the test adopted by the Board and the Court in reviewing alleged agency status was also eroneous. These holdings of the Second Circuit are in direct conflict with decisions rendered by the other courts of appeals.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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June 10, 1980

The Court held that it was not. In this case, however, the Board did not grant the Company a hearing at any step of the representation case concerning the resolution of disputed materal factual issues. Under such circumstances, the rule against relitigation cannot act to deprive the Company of its "day in court". The board's grant of summary judgment in the unfair labor practice proceeding prior to the resolution of key factual issues was improper and must be overturned. This is particularly true where the Company's objections were ruled upon internally by the Regional Director whose own actions were the root cause of the conduct complained of herein.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 553 SEPTEMBER TERM, 1979
ARGUED DECEMBER 14, 1979 DECIDED JANUARY 23, 1980
Docket No. 79-4148

NATIONAL LABOR RELATIONS BOARD,
Petitioner

–v–

U. S. CABLEVISION CORP.,
Respondent.

Before MULLIGAN, OAKES, and GURFEIN,* *Circuit Judges.*
Petition by the National Labor Relations Board for enforcement of an order holding respondent in violation of §§ 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(5) and (1) for refusal to bargain with the certified collective bargaining representative of respondent's employees.

Enforcement granted.

MARJORIE GOFREED, National Labor Relations Board, Washington, D. C. (Norton J. Come, Acting General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Acting Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, and Ruth E. Peters, National Labor Relations Board, Washington, D. C., of counsel), for *Petitioner.*

ROBERT P. WEINTRAUB, Boston, Mass., CHARLES W. SULLIVAN, New York, N. Y. (Deutsch, Weintraub & Glazerman, P. C. and Ira F. Jaffe, Boston, Mass. and Edwards & Angell, New York, N. Y., of counsel), for *Respondent.*

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* Judge Gurfein participated in the oral argument in this case and voted before his death on December 16, 1979 to dispose of the case in the manner set forth in this opinion. He was unable to concur in the opinion itself because it was drafted after his death.

PER CURIAM:

The National Labor Relations Board (NLRB) has petitioned for enforcement or an order determining that respondent U.S. Cablevision Corporation has refused to bargain with the certified collective bargaining representative of its employees in violation of §§ 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(5) and (1). Cablevision acknowledges that it has refused to bargain with the certified representative, the International Brotherhood of Electrical Workers (IBEW), Local 320, but contends that the union was improperly certified because of tainted election procedures.

More specifically, Cablevision argues that the election should be set aside because the union designated as an official observer an employee who had not consented to be an observer for the union and who in fact was opposed to the union. Cablevision contends that this designation of the employee may have influenced other employees to support the union and may have swayed the election, which the union won by only one vote. At minimum, Cablevision requests that the Board be required to permit Cablevision to present its evidence at a hearing.

This Court has said:

> The conduct of representation elections is the very archetype of a purely administrative function, with no *quasi* about it, concerning which courts should not interfere save for the most glaring discrimination or abuse.

NLRB v. *Olson Bodies, Inc.*, 420 F.2d 1187, 1189 (2d Cir. 1970) *cert. denied*, 401 U.S. 954 (1971) (emphasis in original). Nonetheless, this court has also stated:

> [D]espite this broad definition, a party is entitled to a hearing if it demonstrates by *prima facie* evidence the existence of " 'substantial and material factual issues' which, if resolved in its favor, would require the setting aside of the representation election."

NLRB v. *Manufacturing Co.*, 602 F.2d 244, 248 (2d Cir. 1979), *printed at* 604 F.2d Appendix following 671 (emphasis in original).

In our view, the Board's order, even with no prior hearing, is valid and should be enforced. While we do not condone the practice of designating an employee as an election observer without his or her consent, this is not the type of practice that automatically impairs the validity of an election. The designated employee made an ample effort to counteract any inference that his designation demonstrated his support for the union. In short, we cannot say that there are no issues surrounding the designation of the unwilling employee as an observer "that would require the setting aside of the representation election," *Hale Manufacturing, supra*, if resolved in Cablevision's favor. Accordingly, the election will not be set aside and no hearing is required.

Enforcement granted.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK 10007

A. DANIEL FUSARO
CLERK

N.L.R.B. v. U.S. Cablevision Corp. September Term, 1979
Docket No. 79-4148 Decided January 23, 1980

Page 1020, line 12—delete "are no issues" and insert "are any issues" in place thereof.

A. DANIEL FUSARO
Clerk

ADF/hjd

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of April, one thousand nine hundred and eighty.

Docket No. 79-4148

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

U.S. CABLEVISION CORP.,

Respondent.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the respondent, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Due to his untimely death on December 16, 1979, Judge Gurfein, a member of the panel, did not participate in the consideration of this petition.

IRVING R. KAUFMAN
Chief Judge

IRVING R. KAUFMAN

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of April, one thousand nine hundred and eighty.

Present:

HON. WILLIAM H. MULLIGAN,
HON. JAMES L. OAKES,
Circuit Judges.

Docket No. 79-4148

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

U.S. CABLEVISION CORP.,
Respondent.

A petition for a rehearing having been filed herein by counsel for the respondent,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO
A. DANIEL FUSARO,
Clerk

APPENDIX B

Statute and Rules Involved

29 U.S.C. § 157

Employees shall have the right to self-organization, to form, join or assist labor organizations, . . . and shall also have the right to refrain from any or all such activities . . . .

29 C.F.R. § 102.69(a)

. . . Any party may be represented by observers of its own selection, subject to such limitations as the regional director may prescribe . . . .

29 C.F.R. § 102.69(f)

(f) In a case involving a consent election held pursuant to section 102.62(b), if exceptions are filed, either to the report on challenged ballots or objections, or both if it be a consolidated report, and it appears to the Board that such exceptions do not raise substantial and material issues with respect to the conduct or results of the election, the board may decide the matter forthwith upon the record, or may make other disposition of the case. If it appears to the Board that such exceptions raise substantial and material factual issues, the Board may direct the regional director or other agent of the Board to issue and cause to be served on the parties a notice of hearing on said exceptions before a hearing officer.

Supreme Court, U.S.
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U. S. CABLEVISION CORP.,
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SUPPLEMENTAL APPENDIX

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June 13, 1980

240 NLRB No. 23

D-4624
Providence, R. I.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

U. S. Cablevision Corp. and Local 320, International Brotherhood of Electrical Workers AFL-CIO, CLC	Case 2—CA—15793

DECISION AND ORDER

Upon a charge filed on August 8, 1978, by Local 320, International Brotherhood of Electrical Workers AFL-CIO, CLC, herein called the Union, and duly served on U.S. Cablevision Corp., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Acting Regional Director for Region 2, issued a complaint and notice of hearing on August 30, 1978, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on June 30, 1978, following a Board election in Case 2—RC—17833 the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropri-

ate,[1] and that, commencing on or about July 28, 1978, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On September 13, 1978, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On October 2, 1978, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on October 12, 1978, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and in its response to the Notice To Show Cause, Respondent admits its refusal to bargain, but denies that it thereby violated Section 8(a)(5) and (1) of the Act. Specifically, it contends, contrary to the allegation of the complaint, that the Union has

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[1] Official notice is taken of the record in the representation proceeding, Case 2—RC--17833, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C. Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

not been at times material the unit employees' bargaining representative and that its certification to that effect is invalid. Underlying its position is the further contention that its objections to the February 9, 1978, election were, especially without a hearing, improperly overruled and that due to certain alleged "special circumstances," relitigation of matters raised and litigated in the underlying representation hearing cannot properly be precluded in this proceeding. The General Counsel contends that the Respondent's contentions are without merit in that they seek to raise issues which were presented to and decided by the Regional Director and by the Board in the underlying representation case.

A review of the record herein, including the record in Case 2—RC—17833, shows the following: On December 1, 1977, a petition was filed by the Union. On December 28, 1977, the Regional Director approved a Stipulation for Certification Upon Consent Election, executed by the Union and Respondent on that same date, in which the appropriate unit for collective bargaining was found to consist of all full-time and regular part-time construction and maintenance employees employed by U.S. Cablevision Corp. at its facilities located at 360 Fishkill Avenue, Beacon, New York, and Route 17M Monroe, New York, including system technicians, customer technicians, and installers, but excluding all other employees, office, clerical and professional employees, guards, and supervisors as defined in the Act.

On February 9, 1978, an election by secret ballot was conducted under the supervision of the Regional Director, pursuant to the Stipulation for Certification Upon Consent Election. A majority of the unit employees selected the Union as their representative for the purposes of collective bargaining. Respondent filed timely objections to the conduct of the election which were overruled in their entirety by the Regional Director in her Report on Objections and Recommendations issued on March 24, 1978, in which she

recommended instead that the Union be certified as the exclusive collective-bargaining representative of the employees in the unit described above. On April 17, 1978, Respondent filed exceptions to the Regional Director's report and a supporting brief. However, in its decision dated June 30, 1978, the Board found Respondent's exceptions to be without merit and adopted the Regional Director's findings and recommendations and certified the Union as the exclusive collective-bargaining representative of Respondent's employees in the appropriate unit. In its decision the Board held specifically that the issues raised by Respondent in its exceptions to the Regional Director's report raised nothing requiring either reversal of the Regional Director or the holding of a hearing.

Commencing on or about July 7, 1978, and August 16, 1978, the Union by its president, Frank Maher, telephoned Respondent's general manager, Howard Erichsen, and requested that Respondent meet and bargain collectively with it as the exclusive collective-bargaining representative of said employees with respect to their rates of pay, wages, hours of employment, and other terms and conditions of employment. On July 20, 1978, the Respondent by letter advised the Union that it was taking its request to meet and bargain under advisement and by letter dated July 28, 1978, refused and, as it concedes, has continued at all times to refuse to recognize the Union and to bargain with it as the bargaining representative of the unit employees.[2]

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which

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[2] The letters were signed by George P. Sisson, president of Colony Communications, Inc. In its answer to the complaint Respondent admitted that it is a wholly owned subsidiary of Colony and there is no contention that Sisson in his letters of July 20 and 28 was not properly acting on behalf of the Respondent.

were or could have been litigated in a prior representation proceeding.[3]

The issues which the Respondent seeks to raise in defense of its refusal to recognize and bargain with the Union were, as the General Counsel alleges and as it concedes, raised and litigated in the underlying representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence. It does contend that special circumstances exist which require the Board to reexamine the decision made in the representation proceeding. In this regard it relies solely on the fact that its objections to the election involved in part a form used by Region 2 in an election proceeding. However, that matter could have been and in substance was raised by Respondent and in substance litigated in the representation proceeding and in any case does not constitute a "special circumstance" warranting relitigation of, or a hearing on, the decision reached in the representation case. Therefore, we find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of the Respondent

Respondent is a Rhode Island corporation engaged in the operation of providing community antenna television (CATV) services to customers in the Beacon-Monroe area and has maintained its principal office and place of business in Providence, Rhode Island, and field offices located in Beacon and Monroe, New York. During the past year,

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[3] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

Respondent, in the course and conduct of its operations, derived gross revenue in excess of $100,000 and purchased and received at its various facilities, goods and materials valued in excess of $50,000, directly from States of the United States other than the State in which Respondent's facilities are located.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Local 320, International Brotherhood of Electrical Workers, AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. The Representation Proceeding

1. The Unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time construction and maintenance employees employed by U.S. Cablevision Corp. at its facilities located at 360 Fishkill Avenue, Beacon, New York, and Route 17M, Monroe, New York, including system technicians, customer technicians, and installers, but excluding all other employees, office clerical and professional employees, guards, and supervisors as defined in the Act.

2. The Certification

On February 9, 1978, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 2, designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on June 30, 1978, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. The Request To Bargain and Respondent's Refusal

Commencing on or about July 7, 1978, and at all times thereafter, including August 16, 1978, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about July 28, 1978, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since July 28, 1978, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the

several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. U.S. Cablevision Corp. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 320, International Brotherhod of Electrical Workers AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time construction and maintenance employees employed by U.S. Cablevision Corp. at its facilities located at 360 Fishkill Avenue, Beacon, New York, and Route 17M, Monroe, New York, including system technicians, customer technicians, and installers, but excluding all other employees, office clerical and professional employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since June 30, 1978, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about July 28, 1978, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, U.S. Cablevision Corp., Beacon and Monroe, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 320, International Brotherhood of Electrical Workers AFL-CIO, CLC, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time construction and maintenance employees employed by U.S. Cablevision Corp. at its facilities located at 360 Fishkill Avenue, Beacon, New York, and Route 17M, Monroe, New York, including system technicians, customer technicians, and installers, but excluding all other employees, office clerical and professional employees, guards, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at both its Beacon and Monroe, New York, New York, facilities copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicious places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C., January 23, 1979

HOWARD JENKINS, JR., *Member*

BETTY SOUTHARD MURPHY, *Member*

JOHN C. TRUESDALE, *Member*

NATIONAL LABOR RELATIONS BOARD

(SEAL)

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[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 320, International Brotherhood of Electrical Workers AFL-CIO, CLC, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All full-time and regular part-time construction and maintenance employees employed by U.S. Cablevision Corp. at its facilities located at 360 Fishkill Avenue, Beacon, New York, and Route 17M, Monroe, New York, including system technicians, customer technicians, and installers, but excluding all other employees, office clerical and professional employees, guards, and supervisors as defined in the Act.

U.S. CABLEVISION CORP.
(Employer)

Dated_____ By_____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 3614, 26 Federal Plaza, New York, New York 10007, 212-264-0360.

Supreme Court, U. S.
FILED
AUG 1 1980
MICHAEL RODAK, JR., CLERK

No. 79-1940

In the Supreme Court of the United States

OCTOBER TERM, 1979

U.S. CABLEVISION CORP., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board reasonably concluded that the union's designation, on a form provided by the Board, of an employee who had not authorized the union to designate him as an observer did not warrant setting aside the representation election.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 614 F.2d 341. The decision and order of the National Labor Relations Board (Pet. Supp. App. 1-11) are reported at 240 N.L.R.B. No. 23. The Regional Director's denial of election objections and certification of representation are set forth at A. 8-17.[1]

JURISDICTION

The judgment of the court of appeals was entered on January 23, 1980, and a petition for rehearing en banc was denied on April 8, 1980 (Pet. App. 5a-6a). The petition for a writ of certiorari was filed on June 9, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are:

> Section 8(a), 29 U.S.C. 158(a). It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> * * * * *
>
> Section 9(a), 29 U.S.C. 159(a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit

[1] "A." refers to the appendix in the court below. A copy has been lodged with the Clerk of this Court.

appropriate for such purposes shall be exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

STATEMENT

The Union[2] won a representation election in a unit of petitioner's employees by a vote of 11 to 10 on February 9, 1978 (A. 4, 8). Petitioner ("the Company") filed objections to the conduct of the election, alleging that the Union interfered with the employer's freedom of choice by designating as an election observer, on a form provided by the Board, an employee who had not authorized such designation (A. 5-7). The facts concerning this allegation are as follows:

By letter dated January 26, 1978, the Board's Regional Office mailed to both the Company and the Union a letter regarding the designation of election observers, together with a Board form for designation of observers and a form listing instructions for observer conduct during the election (A. 11, 64). On February 1, the Union's president filled out the observer designation form, listing one non-supervisory unit employee as the Union's chief observer and two other employees as additional observers (A. 11, 65). The designation form was signed by the Union president, with the Union's name handwritten directly above his (*ibid.*). The Union's president mailed copies of the observer designation form, the printed instructions for observers, and the Region's January 26 letter to each of the designated observers (A. 11, 65, 66).

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[2]Local 320, International Brotherhood of Electrical Workers, AFL-CIO, CLC.

One of the three employees designated by the Union, Gary Rose, had not authorized the Union to designate him as an observer and was upset by his designation because he had previously expressed the opinion that the Company's employees had no need for union representation (A. 11-12). In the remaining days preceding the election, Rose discussed his designation as a union observer with other unit employees and with certain management representatives (A. 12). As a result of a pre-election agreement that each party would be represented by a single observer, Rose did not serve as an observer during the election (A. 13).

In its objections to the conduct of the election, the Company asserted that the Union's designation of Rose as its election observer improperly forced Rose into publicly announcing to the Company his opposition to the Union just before the election; interfered with the unit employees' ability to freely express their choice at the polls by misrepresenting Rose's position on union representation; and constituted a misuse of the Board's election mechanism since the alleged misrepresentation was conveyed on a Board document (A. 10).

The Regional Director rejected the Company's contentions (A. 13-17), and the Board adopted her recommendation and certified the Union (A. 23). With respect to the Company's allegations of coercion of Rose and interference with the free choice of the unit employees, the Regional Director explained (A. 14-15; footnotes omitted):

> The Employer has furnished no evidence to show that agents of the [Union] had any knowledge of Rose's feelings or that they bore any malice toward him in connection therewith. In a similar vein, there is no indication that the [Union's] agents engaged in any conduct, independent of the designation of Rose

> as an observer, which could be construed as coercive, insofar as it might relate to Rose. With respect to the designation itself, I note in particular that the Board documents sent to Rose were also sent to Dunay and Malouf [the other observers designated by the Union]. The [Union] did not send them to any other unit employees nor did it seek to "make public" its designation of Rose in any other manner. In these circumstances, the fact that Rose felt compelled to discuss the matter with other unit employees and with certain of the Employer's representatives cannot fairly be held to constitute coercion attributable to the [Union], especially as Rose did so without ever informing the [Union] of his objection to having been selected. For the same reasons, even assuming *arguendo* that Rose's fellow employees *were* somehow influenced by the knowledge of Rose's selection as an observer for the [Union], this would not constitute sufficient grounds for setting aside the election.

With respect to the alleged misuse of Board election processes, the Regional Director explained (A. 16-17; footnote omitted):

> Clearly, in the instant case, there can be no suggestion that the Board's neutrality has been called into question. Nor can it even be said that the [Union's] conduct gave rise to the appearance that the Board has participated in the selection of Rose as an observer for the [Union]. The regional office letter which the [Union] included in the packet of materials it sent to Rose showed clearly on its face that it had been sent to representatives of both parties. Throughout the letter, the instructions relating to observers referred to such individuals repeatedly as "your observers." Similarly, Form R-34, containing

> the actual designations, states in pertinent part: "The *undersigned hereby designates* the following NON-SUPERVISORY employees . . . to act as Observers during the hours of balloting" (emphasis added). The form was signed by Frank Maher [the Union President] and showed the name of the [Union] just above the signature in Maher's handwriting. Finally, the instruction sheet (Form NLRB-722) contains general instructions regarding the conduct and responsibilities of all observers and makes no reference to any particular party. The documents were not altered in any way nor did they contain any misrepresentation of Board law or processes. Moreover, as noted above, in view of the fact that the [Union] sent the forms only to the three individuals it had designated as observers, and not to any of the other eligible voters, it would appear to be unwarranted to conclude that the [Union] indeed sought to use Board documents to gain any type of partisan advantage in the election campaign. On the basis of the foregoing, then, there could have been no confusion as to the fact that it was the [Union], and not the Board, which had selected Rose as [the Union's] observer.

Following certification of the Union, the Company refused to bargain, and the Board, on summary judgment, found the Company's refusal to bargain violative of Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1) (Pet. Supp. App. 1-9). Accordingly, the Board ordered the Company to bargain with the Union (Pet. Supp. App. 10-11). The court of appeals enforced the Board's order (Pet. App. 1a-3a).

ARGUMENT

The Company does not challenge the Board's established policy, upheld by the courts, that a party seeking to

overturn a Board election must show not only that improprieties occurred, but also that they interfered with employee free choice to such an extent as to have materially affected the election results. *NLRB* v. *Mattison Machine Works*, 365 U.S. 123, 124 (1961); *Polymers, Inc.* v. *NLRB*, 414 F.2d 999, 1001 (2d Cir. 1969), cert. denied, 396 U.S. 1010 (1970). Rather, the issue here is whether the Board abused its discretion in concluding that the Union's designation of an unwilling employee[3] as an election observer did not coerce the unwilling employee, and did not interfere with the other employees' freedom of choice or involve a misuse of Board processes. This issue, which turns on an evaluation of the particular circumstances of this case, does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490 (1951). In any event, for the reasons set forth in detail in the Regional Director's report on objections (see pages 3-5, *supra*), the Board's conclusion was clearly reasonable.

Furthermore, we note that the Company does not dispute the well-settled proposition that a party is entitled to a hearing on its objections only if it shows the existence of substantial and material factual issues which, if resolved in its favor, would require the setting aside of the election. *NLRB* v. *Hale Manufacturing Co.*, 602 F.2d 244, 248 (2d Cir. 1979). Rather, the Company merely contends that it has met that test here. However, the court below

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[3]The Regional Director pointed out (A. 13-14) that the pertinent Board regulations do not require that a party's designation of an individual as an election observer be conditioned upon the authorization or consent of that individual. Rather, the Board's Rules and Regulations state only that "[a]ny party may be represented [at the election] by observers of his own selection * * *." 29 C.F.R. 102.69(a). Thus, the Regional Director noted, the only restriction that the Board generally places on a party's ability to select observers is that the observers must be non-supervisory employees not otherwise identified with management (A. 14).

correctly concluded (Pet. App. 3a) that in the circumstances presented here the Company was not entitled to a hearing because, even if all of its factual allegations were accepted as true, they were not sufficient to warrant setting aside the election.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

WILLIAM A. LUBBERS
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JOHN E. HIGGINS, JR.
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ROBERT E. ALLEN
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LEE W. JACKSON
Attorney
National Labor Relations Board

AUGUST 1980

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[4]There is no substance to the Company's contention (Pet. 8) that the court of appeals applied an erroneous legal standard in determining the Company's right to a hearing. The court of appeals stated that "[i]n short, we cannot say that there are any issues surrounding the designation of the unwilling employee as an observer 'that would require the setting aside of the representation election,' * * * if resolved in Cablevision's favor. Accordingly, the election will not be set aside and no hearing is required" (Pet. App. 3a, 4a; citation omitted).